SUPREME COURT, U. S.

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No. 74-15

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,

Respondent,

vs.

EDWARD E. REICIN,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Edward E. Reicin, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported. This opinion is printed in the appendix (A. 1) to this petition.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on May 28, 1974. A timely petition for rehearing *en banc* was denied on June 27, 1974. This petition was filed within 30 days of that date. This Court has jurisdiction under 62 Stat. 928, 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law when a general jury verdict of guilty may have been predicated on an alternative theory of guilt which was admittedly unproved?

2. Whether petitioner was denied a fair trial when the trial judge refused to allow an expert medical witness to testify whose testimony would have impeached the government's main witness on a material issue and would have offered substantive evidence on petitioner's theory of the case.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

This petition seeks review of a decision of the Seventh Circuit Court of Appeals affirming a jury verdict of guilty on one of eleven counts of an indictment for mail fraud under 18 U.S.C. §1341.

1.

The Alternative Theories of Guilt.

Each count of the indictment charged the petitioner, an attorney, with conspiring with Dr. William Becker to defraud insurance companies in personal injury claims by (1) preparing and submitting false medical bills and reports for claimants, and by (2) causing claimants to take extra time off from their jobs in order to increase the damages.

The jury acquitted petitioner of ten counts, and convicted him on count 9. The facts pertinent to count 9 are set forth in the opinion of the Court of Appeals (A. 1-6). *

The government's case on count 9 was based on two alternative theories, namely, that petitioner did either or both of the following pursuant to the scheme:

1. Knowingly submitted to Royal Globe Insurance Company a false medical report and bill regarding the client Eauslin (par. 7 of the indictment) (A. 26);

2. Caused Eauslin to be absent from his job in order to inflate his claim (par. 10 of the indictment) (A. 27).

In closing argument, the prosecutor argued that the government had proven *both* branches of its alternative theory. (A. 29.) The trial judge instructed the jury that they could convict petitioner under Count 9 if the jury found that the government had proven *either* charge. (A. 11).

For purposes of this petition, petitioner assumes *arguendo* that the government introduced a *prima facie* case with regard to the first alternative, the medical report and bill. However, the government admitted on appeal and the 7th

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* "A." refers to pages of the printed appendix to this brief. "R." refers to pages of the transcript of proceedings at trial. Additional factual appendices may be found in petitioner's initial and reply briefs filed in the Court of Appeals and made part of this record.

Circuit found that the government did not make a *prima facie* case with respect to the "lost time" charge, the second branch of the government's alternative theory. Thus, the Court of Appeals said (A. 9):

> ". . . we do agree that the Government's inability to establish that the defendant and Becker caused Eauslin to take unnecessary time off from his job weakened the Government's case. The issue is whether the lack of such proof, despite the presence of the other elements of the scheme as alleged in the indictment, vitiates the conviction on Count 9."

The Court of Appeals held that *Stromberg* v. *California,* 283 U.S. 359 (1931) was not on point because the doctrine of *Stromberg* is limited to special statutory provisions involving constitutional rights. The Court of Appeals said (A. 12):

> "In the case at bar, there is no danger that the defendant might have been found guilty for having engaged in conduct that the Government cannot constitutionally prohibit."

The Court of Appeals did not allude to this Court's opinion in *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki,* 358 U.S. 613 (1959), or to other decisions of various courts of appeals which have applied the *Stromberg* principle in non-constitutional cases. The only case which the Court of Appeals discussed was *United States* v. *Groves,* 122 F.2d 87 (2d Cir. 1941), *cert. denied,* 314 U.S. 670, also involving a mail fraud prosecution in which a branch of the government's alternative theory was not proven. The Court of Appeals said (A. 12):

> "If it [Groves] stands for the broad proposition that each act constituting a part or detail of the scheme charged in a mail fraud indictment, but not essential to the existence of the scheme, must be proved or the entire prosecution fails, then we reject that viewpoint."

The jury verdict of guilty on Count 9 was general and did not specify whether the jury convicted on the medical bill and report charge, the lost time charge or both.

This ruling by the Court of Appeals constitutes the first and primary basis for petitioner's request that this Court grant a Petition for a Writ of Certiorari in this case, as is more fully explained in Part I of the Reasons For Granting The Writ.

2.

Refusal to Allow Dr. Atlas To Testify.

The government's main witness was Dr. William Becker, petitioner's alleged accomplice, who had pleaded guilty and had received probation. Becker's credibility was the heart of the government's case.

Becker's most damaging testimony involved alleged conversations with petitioner in which petitioner demanded that claimants be hospitalized in order to inflate the claim. *Becker testified that in each instance the claimant did not need to be hospitalized.* (R. 105, 202, 219, 227).

On cross examination, Becker admitted that he could not recall the conversations and that he was assuming petitioner requested hospitalization because none of the claimants required it (R. 272-73):

> "Q. Doctor, as you sit there now, I take it you don't remember those specific conversations, do you?"
>
> "A. No, I couldn't. Seven years have gone by, but my recollection is refreshed by these papers, because I know my way of operating, and *I would never put a patient in the hospital unless Mr. Reicin asked me to, and the fact that he was in the hospital and really did not need the hospitalization indicates to me that he called me. It had to be. I did not work any other way.*" (Emphasis added).

Petitioner called Dr. Gerald Atlas to testify as an expert medical witness. The trial judge refused to allow Dr. Atlas to testify on grounds of relevancy. (R. 2496). An offer of proof was made disclosing that Dr. Atlas would have testified that there were medical reasons for hospitalizing all claimants involved in the 11 indictment cases who had been hospitalized, and that in the cases of two claimants, hospitalization was imperative. (R. 2499-2503; 2752-60).

One stated purpose of Dr. Atlas' testimony was to impeach Dr. Becker's testimony that none of the clients required hospitalization and that none would have been hospitalized but for petitioner's insistence. (R. 2498-99). Impeaching Becker would have allowed petitioner to argue that he did not ask Dr. Becker to hospitalize clients. Becker's testimony was the basis of the government's argument that insurance companies were defrauded by receiving unnecessary hospital bills from petitioner. (R. 2957, 2964, 2967-68).

The trial judge was also informed that Dr. Atlas' testimony would be the basis for petitioner's argument of good faith and absence of intent to defraud in the event the jury chose to believe Becker's uncorroborated testimony that petitioner insisted on clients' hospitalization. (R. 2499).

The Court of Appeals held that Atlas' testimony was properly excluded because the impeachment "went to collateral matters." (A. 16). Accepting Becker's unimpeached testimony that petitioner "insisted on hospitalization," the Court of Appeals accused petitioner of "reckless indifference." (A. 16).

REASONS FOR GRANTING THE WRIT

Introduction

The Seventh Circuit's decision in this case is directly contrary to the holding of the Second Circuit Court of Appeals in *United States* v. *Groves,* 122 F.2d 87 (2d Cir. 1941), *cert. denied* 314 U.S. 670 and other well reasoned decisions of the Fourth, Fifth and Ninth Circuits. These cases hold that when a general jury verdict may have been based on alternative grounds of guilt, one of which grounds is unconstitutional, erroneous, or unsupported by the evidence, a conviction must be reversed and a new trial ordered.

Moreover, the decision is contrary to the holding of this Court in *Stromberg* v. *California,* 283 U.S. 359 (1931). Although the Seventh Circuit attempted to distinguish *Stromberg* on the grounds that it involved First Amendment rights, the Seventh Circuit did not discuss the holding of this Court in *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki,* 358 U.S. 613 (1959) which is directly on point.

Faced with multiple charges, as petitioner was in this indictment, petitioner's right to a fair trial requires that he be convicted only upon evidence sufficient to prove the *essential* charges of the crime. In this case, there were two essential charges, only one of which was proven, but the jury was free to convict on either.

In addition, the Seventh Circuit affirmed the District Judge's refusal to allow petitioner to call Dr. Atlas as an expert witness. Dr. Atlas would have not only impeached Dr. Becker, the government's primary witness, but would also have offered substantive evidence on petitioner's theory of the case. Petitioner had the right not only to im-

peach the government's main witness, but also to offer evidence which would tend to disprove a number of the government's charges. By refusing petitioner permission to call an expert witness, the trial court and the Court of Appeals denied petitioner this right.

I.

There Is A Conflict Between The Decision Below And Decisions Of This Court And Several Courts Of Appeals.

The government's case on Count 9 was based upon the charges that petitioner (1) knowingly submitted to Royal Globe Insurance Company a false medical report and bill regarding Eauslin (par. 7 of the indictment; A. 26), and (2) caused Eauslin to be absent from his job in order to inflate his claim (par. 10 of the indictment, A. 27). The trial judge instructed the jury that they could convict petitioner under Count 9 if the jury found the government had proven either charge. *

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* The trial judge and the attorneys spent considerable time discussing the instructions regarding the jury's ability to convict defendant upon finding beyond reasonable doubt that defendant either (1) knowingly submitted false medical bills and reports to the Royal Globe Insurance Company or (2) knowingly caused Eauslin to absent himself from work in order to inflate his claim. (R. 2829-41). The net result was government's instruction 39, given over defense objections, as follows:

> "A scheme to defraud under the Mail Fraud statute means some plan to procure money or property by means of false pretenses or representations calculated to deceive persons of ordinary prudence. It is not necessary, however, that any insurance company was actually defrauded by the scheme. *Nor is it necessary that the Government prove every one of the pretenses, representations and acts charged in the indictment.* The Government must prove that defendant knowingly participated in such plan, and that such representations were made by him, or his agents, knowing they were false, and with intent to defraud." (Emphasis added) (A. 11).

The government admitted on appeal and the Seventh Circuit found that the government did not make a *prima facie* case with respect to the "lost time" charge. (A. 9).

It has long been the law that when a case is submitted to the jury on alternative grounds of guilt, one of which is unconstitutional, erroneous, or unsupported by the evidence, a conviction must be set aside and a new trial is required. This doctrine was enunciated by this Court in *Stromberg* v. *California*, 283 U.S. 359 (1931), where this Court reversed a conviction because it could not determine from the record whether the defendant was convicted on a constitutional ground or an unconstitutional ground. (283 U.S. at 368). *

Contrary to the opinion of the Seventh Circuit, this rule of law is not restricted to First Amendment cases. In *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki, supra*, the jury had been charged that it could hold the ship owner liable for a wrongful death act claim under either the doctrine of unseaworthiness or the doctrine of negligence. This Court determined that the doctrine of unseaworthiness was inapplicable to the facts of the case. The Court held that since there was no way of knowing whether or not the claim of unseaworthiness was the basis for the verdict, the case must be reversed and remanded for a new trial. (358 U.S. at 618-19)

This Court has recently made clear that the *Stromberg* rule, applied in *Halecki*, was not limited to First Amendment cases. In *Eaton* v. *City of Tulsa*, 94 S.Ct. 1228, 1230 (1974), this Court stated: "and this principle is not limit-

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* See also *Bachellar* v. *Maryland*, 397 U.S. 564, 571 (1970); *Leary* v. *United States*, 395 U.S. 6, 30-32 (1969).

ed, nor should it be, to cases in which the conviction may have been based on protected speech."

The *Stromberg* rule has been applied in numerous criminal cases decided by the circuit courts. A case directly on point is *United States* v. *Groves*, 122 F.2d 87 (2d Cir. 1941). The defendants were charged with violating the mail fraud statute. "Each count of the indictment set forth three separate frauds, alleged to have been practiced on G.I.C. pursuant to the scheme." (122 F.2d at 89). On appeal, the Second Circuit held that sufficient evidence had been introduced to submit the case to the jury as to the first fraud, but that the government did not make a *prima facie* case against defendant George Groves as to the second and third frauds. The court held (122 F.2d at 91):

> "But there was no further evidence at all of his connection with the procurement of the two fraudulent commissions, and under the circumstances we feel that a jury would not be justified in finding that he participated in either of them. But if it could not find that he participated in both, his conviction must be reversed; for it was allowed, over objection, to consider together his guilt in respect of each of the three frauds alleged, and hence each must be proven [Citing cases.]"

In cases other than mail fraud, the *Stromberg* rule has been applied consistently. In *United States* v. *Meriwether*, 440 F.2d 753 (5th Cir. 1971) a tax evasion conviction was reversed where the jury was allowed to convict under either the "specific item" or the "net worth" method in a situation where the government had failed to make a *prima facie* case as to the net worth method. (440 F.2d at 757). The Court's attention is also directed to *United States* v. *Shuford*, 454 F.2d 772, 780 (4th Cir. 1971) (false statement and conspiracy prosecution); *Beck* v. *United States*, 298 F.2d 622, 630-31 (9th Cir. 1962) (tax evasion

prosecution); *United States* v. *Driscoll,* 449 F.2d 894, 898 (1st Cir. 1971) (conspiracy prosecution).

The Seventh Circuit has rejected application of this rule to mail fraud cases. It erroneously refused to follow the *Groves* decision and limited the *Stromberg* rule of law to First Amendment cases. In holding that the rule was not applicable to mail fraud prosecutions, the Seventh Circuit stated: [T]he challenged portion of this indictment was merely an illustrative aspect of an overall scheme and did not constitute *per se* a separate offense or separate legal theory." (A. 12). This is simply not an accurate statement of the case. The prosecuting attorney argued the lost time charge as a separate basis for a finding of guilty and emphasized it exclusively during his argument on Count 9.* The trial judge gave instructions to the jury to the same effect. The case, as described by the Court of Appeals, involved a "scheme to defraud . . . by preparing and submitting false and exaggerated medical reports and bills to the companies and by causing claimants 'to absent themselves from employment to increase their alleged damages.'" (A. 2).

The same problem arises repeatedly in mail fraud prosecutions. Defendants are often faced with a variety of charges, some of which go unproven. In this case, defense counsel attempted to limit the charges consistent with the proof and the arguments of the parties. Prior to trial and at the close of the government's case, the trial judge struck several charges which were insufficient in law or fact.**

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* The prosecutor's closing argument relating to Count 9 is set forth in the appendix to this petition. (A. 29-30).

** The trial judge struck the lost time charge from Counts 3, 4, 5, 6 and 10 at the close of the government's evidence. The judge refused to strike it from Count 9.

Nevertheless, the trial judge instructed the jury that the government did not have to prove "every one of the pretenses, representations and acts charged in the indictment." Accordingly, the jury was free to convict on either the medical bill issue or the lost time issue. *

The Seventh Circuit seemingly agrees that the government must prove "essential" components of the scheme (A. 12), but its decision effectively forecloses the opportunity to assure that the jury has convicted on this basis. (The Court reproached the district judge for performing the useless act of striking paragraph 10 from five of the counts.) (A. 13). There were two "essential" elements as even the Court of Appeals recognizes. (A. 2). Whether the medical bill and report charge and the lost time charge are considered essential elements of one scheme or as two separate schemes is irrelevant. The rule set forth in *Stromberg* and the other cases cited by petitioner should have been applied.

Given the salutary effect of the rule of law enunciated in *Stromberg* and applied in *Halecki*, there simply is no reason to reject its application in mail fraud cases as the Seventh Circuit has done.

II.

A New Trial Was Required Because The Trial Court Committed Prejudicial Error In Refusing To Allow Petitioner To Call Dr. Atlas As An Expert Witness.

During petitioner's presentation of evidence, Dr. Gerald Atlas, an eminently qualified physician and surgeon, was

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* Conviction on the lost time issue would violate the Due Process Clause of the United States Constitution since there was admittedly no proof on this issue. See *Thompson* v. *City of Louisville*, 362 U.S. 199, 206 (1960).

called to testify. (R. 2487-93). Dr. Atlas had reviewed all pertinent medical records of petitioner's clients who had been hospitalized and was prepared to testify regarding, among other things, their need for hospitalization. (R. 2499-2503; 2752-60).

Dr. Atlas' testimony would have directly impeached Dr. Becker's statement that *none* of the clients required hospitalization. Dr. Atlas, in an offer of proof, stated that each of the clients hospitalized in fact should have been hospitalized and that in two instances, the need for hospitalization was an absolute medical necessity.* Moreover, Becker admitted during his examination that he could not actually recall conversations with petitioner wherein petitioner "demanded" that clients be hospitalized but insisted that the conversations took place because the clients "really did not need the hospitalization [which] indicated to me that he called me." (R. 272-73). Consequently, if Atlas had been allowed to testify regarding the need for hospitalization, he not only would have impeached Becker with respect to the need for hospitalization but would have destroyed an important part of Becker's testimony.

Agreeing with the government, the Court of Appeals stated that Atlas' testimony was properly excluded because the impeachment portion "went to collateral matters." Perhaps the Court of Appeals' holding would be accurate if the government had indeed treated this matter as "collateral." However, the government elicited Becker's testimony regarding alleged demands by petitioner that clients be hospitalized a total of five times and argued to the jury that this was definitive proof of petitioner's knowledge of the "scheme." (R. 2964).

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* Based on Atlas' testimony, petitioner could have argued and the jury could reasonably have inferred that Becker deliberately perjured himself. (R. 2501-02; 2759).

It is elementary that the testimony of a witness may be contradicted on a material point by the testimony of another witness. See *United States* v. *Halperin*, 441 F.2d 612, 617 (5th Cir. 1971). When the trial court refused to strike certain portions of Dr. Becker's direct testimony, including testimony that petitioner insisted on hospitalization, petitioner was entitled to meet and impeach Becker's testimony.

As stated above, Dr. Atlas' testimony was also relevant on the issue of whether and how severely the hospitalized clients were injured. The government relied on "unnecessary" hospital bills as evidence of petitioner's fraud since these hospital bills were forwarded to insurance companies to substantiate the clients' claims. For this reason, petitioner had a right to show that the hospitalization was required and that the insurance companies were not defrauded. See *Coleman* v. *United States*, 167 F.2d 837, 840 (5th Cir. 1948); *Norcott* v. *United States*, 65 F.2d 913, 919 (7th Cir. 1933).

The Court of Appeals answered this argument of petitioner by stating that the success of a scheme to defraud need not be shown and that defendant would be guilty of mail fraud even if the insurance company had not lost any money. However, this argument avoids the real issue. Since the government attempted to show that the hospitalization was unnecessary and argued this prejudicial fact to the jury, it was certainly proper for petitioner to introduce evidence that the hospitalization had been required and that the insurance company paid only for services which were properly rendered.

Finally, in the event that the jury chose to believe Becker's testimony that petitioner had insisted on hospitalizing the clients, Dr. Atlas' testimony was material to the issue

of petitioner's good faith, and conversely lack of intent to defraud. To the extent that clients in fact required hospitalization, the jury could have found that petitioner did not intend to defraud. In mail fraud cases, good faith is a complete defense. *Durland* v. *United States,* 161 U.S. 306, 313-14 (1896); *Beck* v. *United States,* 305 F.2d 595, 599 (10th Cir. 1962).

The question of good faith and conversely lack of intent to defraud is particularly a jury question. A liberal policy as to the admission of evidence on questions of intent assures that the jury will have all relevant facts upon which to reach its decision. See, *e.g., United States* v. *Diamond,* 430 F.2d 688, 692 (5th Cir. 1970); *United States* v. *Shavin,* 287 F.2d 647, 654 (7th Cir. 1961).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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